Petition

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ALEXANDER L. STEVAS,
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81-1234

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

DEWITT TALMADGE LANGFORD . . Petitioner

versus

COMMONWEALTH OF KENTUCKY . . Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY AND APPENDIX

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CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been served upon Hon. Steven Beshear, Attorney General, Capitol Building, Frankfort, Kentucky, 40601; and that one copy each has been served upon Hon. R. M. Spragens, Judge, Marion County Court House, Lebanon, Kentucky and Hon. Alec Stone, Commonwealth Attorney, Grayson County Court House, Leitchfield, Kentucky. This is to further certify that all parties required to be served have been served by ordinary mail this 31st day of December, 1981, postage prepaid, and that service of this Petition has been made in conformity with Supreme Court Rule 28.3.

David Murrell

Rebecca E. Murrell

QUESTION PRESENTED FOR REVIEW

Whether the trial court in a state criminal prosecution abused Petitioner's federal constitutional right under the Sixth and Fourteenth Amendments to present relevant evidence in his own defense by denying Petitioner the opportunity to add credibility to his testimony that he shot Vic Stadter and Jim Tregoning in self-defense where the Court refused to admit into evidence the deposition testimony of Harvey O. Dail concerning Vic Stadter's reputation for possessing a violent character; concerning Vic Stadter's past specific violent acts and concerning the long association between Vic Stadter and the decedent, Jim Tregoning.

PARTIES

The parties to this suit are Dewitt Talmadge Langford, Petitioner, and the Commonwealth of Kentucky, Respondent.

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OPINION BELOW

The Kentucky Court of Appeals entered an unpublished Opinion, (Appendix A), in this case, Kentucky Court of Appeals file no. 80-CA-905 MR on April 24, 1981 in which that Court affirmed Petitioner's criminal conviction of ten years for second degree manslaughter. This opinion rendered by the Kentucky Court of Appeals was made final by the denial by the Supreme Court of the Commonwealth of Kentucky of Petitioner's motion for discretionary review entered October 6, 1981.

JURISDICTION

The judgment of the Trial Court in this case was entered on April 30, 1980. The judgment of April 30, 1980 was appealed. The order entered ruling on the Appeal was entered April 24, 1981. An order denying Petitioner's petition for rehearing was entered on June 26, 1981 and the

order of the Kentucky Supreme Court denying Petitioner's motion for discretionary review was denied October 6, 1981. (Appendix B) Appellant was granted a stay of execution in order that he could file this petition for writ of certiorari on October 23, 1981.

This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved in this case are:

1. The Sixth Amendment to the Federal Constitution:

> "In all criminal prosecution the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor, . . . "

2. The due process clause of the Fourteenth Amendment:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

This case arose out of the shooting which occurred at Petitioner's home on the evening of December 15, 1979 during which Vic Stadter was injured and in which a man by the name of Jim Tregoning was killed. At the trial of Petitioner for the assault of Vic Stadter and the murder of Jim Tregoning Petitioner was convicted of second degree manslaughter for the murder of Jim Tregoning and sentenced to a term of ten years and a hung jury verdict was returned on the assault charge against Defendant Vic Stadter.

Petitioner is a seventy-seven year old man who has been involved in the oil and gas business for at least fifty years and who has no prior convictions. Vic Stadter has been a business associate of Petitioner's. Stadter had made large investments in Petitioner's oil and gas business in the State

of Kentucky and had become increasingly disgruntled with the way in which Petitioner was conducting his business. The decedent, Jim Tregoning, was an associate of Vic Stadter and was, until the night of the shooting totally unknown to Petitioner.

Petitioner, who had felt fairly close to Vic Stadter as a business associate, had, during the two or three months prior to December 15, 1979, come to fear Stadter as Stadter had begun relating to him his past involvement in crimes of high intrigue. Petitioner began to feel that Stadter was, in fact, vicious. This fear was substantially increased two or three days prior to the shooting when Petitioner's bookkeeper, Mel Holloway, called Petitioner while he was out of town on a business trip to inform him that Stadter had verbalized to Holloway a threat on

Petitioner's life. This testimony concerning this particular threat was corroborated by Holloway's own testimony which related not only this particular threat on Petitioner's life by Stadter but also related at least one prior threat.

According to Petitioner's testimony, on the night of December 15, 1979 when Stadter arrived at Petitioner's home with decedent, a man unknown to Petitioner, the conversation turned to business. Petitioner informed Stadter that essentially he did not wish any further business dealings with Stadter. At this point in the conversation Stadter and the decedent, with clenched fists, began backing Petitioner into a wall. Stadters eyes became red and the two men began calling Petitioner profane names. Petitioner then felt Stadter put something hard into his side which he believed to be a gun. Petitioner then,

being by the couch, reached under a pillow for a gun which he had temporarily placed there until he could properly store it after returning from a trip earlier that very evening.

Petitioner shot Stadter in the side and was somewhat surprised that Stadter ordered the decedent to shoot Petitioner. Petitioner recalls thinking that Stadter must have been the decedent's boss. For the decedent approached with what appeared to be a gun. The Petitioner fired one shot at the decedent but he continued to approach. The Petitioner then aimed for the decedent's midsection, having realized that the decedent did in fact have a gun and this time intentionally fired a second shot at the decedent, this time fatally wounding him.

Vic Stadter adds additionally to the facts

presented by the Petitioner in his testimony by stating that after he was wounded he ran to the bedroom to get a gun. He locked the bedroom door, reached for the telephone and dialed the operator to say that there had been a shooting. He then found the revolver lying next to the telephone, picked it up, and fired through the door at Petitioner. Stadter concluded by testifying that it was shortly after this incident that the constable arrived and found Jim Tregoning dead and began to make the arrests which resulted in the trial of the instant case.

Petitioner's trials for the murder of Jim Tregoning and the assault of Vic Stadter were conducted simultaneously. At the trial, Petitioner sought to enter the deposition testimony of one Harvey O. Dail, a long time associate of Vic Stadter who was unavailable for trial

because of his incarceration in a federal prison, and because the Court had overruled Petitioner's motion to compel his attendance at trial. Petitioner wished to offer this testimony into evidence for the purpose of showing those acts of Vic Stadter's past lifetime which had caused him to believe Stadter to be criminal and vicious and which had caused Petitioner to come to fear Stadter during the two or three months prior to the time when he had received the direct threat against his life and the night of the fatal shooting. Petitioner also sought to have the deposition testimony introduced to show the violent nature of Stadter's character and reputation. Finally Petitioner sought to show the likelihood that Vic Stadter would have engaged in a plot or conspiracy to kill Petitioner.

Harvey O. Dail's deposition testimony which

was admitted by avowal indicated that he and Vic Stadter had been long time acquaintences. According to Mr. Dail, he had known Stadter to be personally involved in smuggling wollen and electrical items into Mexico from the United States; to have been arrested and convcited in New York on a heroine charge; that Stadter had been involved in a high intrigue operation, the handling of which consumed over a year, which eventually resulted in the successful escape of his former cellmate and convicted murderer from a Mexican prison for which Stadter had arranged for the flying of a helicopter into the heart of the Mexican prison so that his former cellmate could be physically lifted from the prison ground; that Stadter had on one occasion threatened to kill a pilot by the name of Floyd Parks with whom he and Dail had flown formerly; that Stadter had told him of several incidents where

he had had several people harmed; that Dail considered Stadter a violent individual based on an association extending over twenty years; that he had seen Stadter become involved in fisticuffs and brawls on at least six to eight occasions; that he had witnessed Stadter throw one man bodily from the second story window of a nightclub; that Stadter had hit Dail; that Stadter had been involved in smuggling marijuana out of Mexico into the United States; that Stadter had pulled a shotgun on Dail and threatened to kill him; that he had seen Stadter pull a shotgun on and threaten to kill some Mexican customs officials and that Stadter had had a long standing acquaintance with Jim Tregoning, the decedent. The jury then did not learn of these facts or indications concerning Vic Stadter through Mr. Dail's deposition testimony or from any other source during

the course of this trial.

Petitioner who had raised the defense of self defense at the trial of this matter and who, in fact, received an instruction on self defense objected to the Court's denial of Petitioner's motion to admit the above mentioned deposition testimony at trial (T.E.p,580-584, Appendix C) and Petitioner objected to the constitutionality of that denial when he stated:

> "The Appellant contends that the Court committed error in refusing to permit the Appellant to read the deposition of Harvey O"Dell (sic) into evidence. . . . To deny Appellant the opportunity to present this testimony to the jury is to deny him the right to present a defense, as required by the Sixth Amendment and Fourteenth Amendment of the Federal Constitution. See Chambers v. Mississippi, 410 U.S. 284." Petitioner's Brief on Appeal.

The Court of Appeals for the Commonwealth of Kentucky rejected Petitioner's constitutional argument for the reason that the

proffered testimony concerning Stadter's reputation for violent character and past history of conspiratous activity for the commission of crimes had no bearing whatsoever on Petitioner's conviction for shooting and killing the decedent. Petitioner's petition for rehearing and motion for discretionary review were denied and this petition for writ of certiorari follows.

QUESTION FOR REVIEW

QUESTION

Whether the trial Court in a state criminal prosecution abused Petitioner's constitutional right under the Sixth and Fourteenth Amendments to present relevant evidence in his own defense by denying Petitioner the opportunity to add credibility to his testimony that he shot Vic Stadter and Jim Tregoning in self defense where the Court refused to admit into

evidence the deposition testimony of Harvey O. Dail concerning Vic Stadter's reputation for possessing a violent character; concerning Vic Stadter's past specific violent acts and concerning the long association between Vic Stadter and the decedent, Jim Tregoning.

The issue presented for review in this case is one which the Supreme Court has not addressed but is one which is ripe for review. Further the issue which Petitioner wishes this Court to review is the question which the Commonwealth of Kentucky through its Opinion rendered by the highest Court of this state has decided differently from a substantial number of its sister states in this country.

In substance then the threshold question presented for review by this Court is

whether a State Court can deny Petitioner the right to present evidence in his own defense tending to enhance his credibility and strengthen the grounds of his defense when the Supreme Court has held that it is a denial of the Defendant's Constitutional right to deny him the right to present relevant evidence in his favor even where presentation of that evidence may violate some state evidentiary rule.

It was not until 1967 that this Court directly addressed itself to the issue of whether the compulsory process clause of the Sixth Amendment of the Federal Constitution should in fact be applied to the States through the due process clause of the Fourteenth Amendment of the Federal Constitution. In holding that the Sixth Amendment did in fact apply to the State and to State criminal prosecutions the Supreme Court held:

> "The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14 (1967).

This Court has since reinforced its holding in Washington, in Chambers v. Mississippi, 410 U.S. 284 (1973), Greene v. Georgia, 442 U.S. 95 and United States v. Nixon, 418 U.S. 683.

In Chambers this Court decided that a state evidentiary rule which precluded the admission into evidence of a certain kind of hearsay evidence must fall if the application of that rule would deny the defendant the opportunity to present his defense. Similarly in Greene this Court held that hearsay evidence could not be excluded where it was relevant to the punishment phase of defendant's trial. Finally in the Nixon case this Court held that the

defendant has the right to present all relevant and admissible evidence in his own behalf.

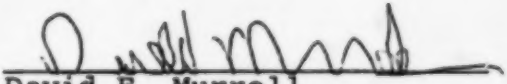
While this Court has clearly stated that a defendant has a constitutional right to present evidence in his own defense at a criminal trial this Court has thus far failed to solidify this doctrine into a longstanding workable legal principle by its failure to date to establish a constitutional standard or guidepost which a state criminal court can use to determine the nature and the extent of testimony that a defendant should be permitted to admit into evidence in his own defense.

Although each State has its own set of evidentiary rules determining what is and is not relevant and competent evidence, it can only fall to the province of the Supreme Court of the United States to set standards

governing the manner in which each state criminal judge must evaluate and apply its particular rules of evidence so as not to deny a defendant his constitutional right to present his own defense.

A subisidiary question which flows from this larger issue which this Court has likewise not addressed is whether a state Court in a criminal prosecution may determine the evidence sought to be presented by a defendant concerning the reputation of a victim for possessing a violent character is not relevant to the defendant's defense when a substantial number of that state's sister state courts and at least one federal circuit court have held such evidence admissible in the presentation of an accused's defense. See e.g. U.S. v. Burks, 470 F 2d 432, People v. Smith, 57 Cal. Reptr. 508.

For the foregoing reasons we request that this Court issue a writ of Certiorari in the instant case.



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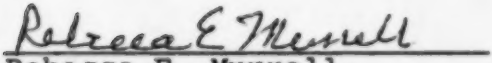

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APPENDIX

APPENDIX A

OPINION RENDERED:
April 24, 1981;
10:00 a.m. NOT TO
BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 80-CA-905-MR

DEWITT TALMADGE LANGFORD APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE KENNETH GOFF, JUDGE
ACTION NOS. 80-CR-001-& 80-CR-002

COMMONWEALTH OF KENTUCKY APPELLEE

AFFIRMING

* * * * * * * *

BEFORE: COOPER, GUDGEL and VANCE, Judges.

GUDGEL, JUDGE. This is an appeal from a judgment of the Grayson Circuit Court. Appellant was convicted of the offense of second-degree manslaughter and sentenced to a prison term of ten years. He contends that the evidence was insufficient to support a verdict of second-degree manslaughter; that the court erred by accept-

ing the jury's verdict; and that the court erred by refusing to permit the deposition of a federal prisoner to be read to the jury. We affirm.

Appellant was indicted for murder in connection with the shooting death of one Jim Tregoning, and for the offense of assault in the first degree in connection with the shooting and wounding of one Vic Stadter. The shootings occurred on December 15, 1979, after Stadter and Tregoning went to appellant's home in Grayson County with their wives. At the time, Stadter was involved with appellant in an oil and gas venture in Leitchfield. It is uncontradicted that appellant reached under a cushion on his sofa, pulled a gun, shot and wounded Stadter and then turned the weapon on Tregoning and fired several shots at him. Tregoning died.

The testimony differed sharply as

to why appellant had pulled the gun and shot the men. Stadter testified that appellant pulled the gun from underneath the sofa and fired, without any provocation. Appellant claimed that Stadter and Tregoning had approached him, and that Tregoning held a gun on him and he fired in self-defense. Although the weapon allegedly possessed by Tregoning was not found at the shooting scene, appellant claimed that Tregoning's wife had picked it up and concealed it immediately after the shooting. Appellant also testified that Stadter and Tregoning planned to kill him in order to obtain control of his Grayson County oil and gas interests. The case was submitted to a jury, with the court giving instructions on the offenses charged and on appellant's defense of self-defense. The jury could not reach a verdict with respect to the charge

of assault of Stadter but returned a verdict that appellant was guilty of second-degree manslaughter in the death of Tregoning. This appeal followed.

First, appellant contends that there was insufficient evidence to justify a conviction of second-degree manslaughter, and that no instruction on that offense should have been given to the jury. The basis for this contention is that there was no evidence that appellant's conduct was wanton, only that it was intentional. Even if this contention had merit, it was not preserved for review.

Appellant's counsel requested that the court give instructions on the lesser included offenses of murder. Therefore, appellant cannot complain on appeal that the court erred by giving a second-degree manslaughter instruction, because he made no objection to the instruction,

and in fact, requested that it be given. RCr 9.54; Davidson v. Commonwealth, Ky., 555 S.W. 2d 269 (1977); Hopper v. Commonwealth, Ky., 516 S.W.2d 855 (1974). In addition, although appellant made a motion for a directed verdict at the close of the Commonwealth's case, he failed to renew that motion at the close of all the evidence. Therefore, the issue of whether the evidence is sufficient to support a conviction for second-degree manslaughter was not preserved for review. Commonwealth v. Blair, Ky., 592 S.W.2d 132 (1979); Kimbrough v. Commonwealth, Ky., 550 S.W. 2d 525 (1977). In an attempt to avoid these preservation problems, appellant contends that the errors were ones of constitutional magnitude and should be reviewed by this Court even though they were not preserved. This contention is without merit. Blake v. Commonwealth, Ky. 607 S.W.2d 422 (1980).

Nest, appellant contends that the verdict of the jury finding him guilty and fixing his punishment at confinement in the penitentiary not to exceed ten years was erroneously accepted by the court, We disagree.

The court's Instruction Number 3 directed the jury, if it convicted appellant of the offense of second-degree manslaughter, to fix a sentence of "not less than five nor more than ten years in your discretion." Along with the court's instructions, the jury was given "Forms of Verdict" prepared by the court. Form of Verdict Number 4, which the jury was to use if it found the defendant guilty of second-degree manslaughter, stated that they were to "fix his punishment at confinement in the penintentiary for a period not to exceed _____ years."

It is obvious, from reviewing the

court's instructions, that the court apparently made a mistake in drafting the "Forms of Verdict" by adding the words "not to exceed" to the portion of the form to be used by the jury in fixing appellant's sentence if they convicted him of second-degree manslaughter. However, appellant made no objection to the "Forms of Verdict" given to the jury, and after the jury returned a verdict, appellant made no objection to the verdict as returned. In addition, it is obvious, from reviewing all of the instructions given by the court, that the jury intended to fix appellant's penalty at a prison term of ten years, as they were authorized to do by Instruction Number 3, and merely because the form for reutrning such a verdict contained an error does not afford a sufficient basis for arguing that there was any prejudice to appellant as a

result. Further, appellant made no objection when he was sentenced by the court to a prison term of ten years pursuant to the jury's verdict. Therefore, even if the court did err by accepting the jury's verdict, appellant waived the error. Franklin v. Commonwealth, Ky. 490 S.W.2d 148 (1972).

Finally, appellant contends that the court erred by refusing to permit him to introduce in evidence the deposition of one Harvey O. Dail, an unavailable witness whose testimony was taken by deposition at a federal prison in Texas. The testimony in the deposition details a long history of dealings between the witness and Vic Stadter and describes various alleged criminal activities of Stadter. Appellant contends that the jury was entitled to know about Stadter's background and history detailed in the deposition because it was relevant

for purposes of giving credibility to appellant's claim that he had to shoot Stadter and Tregoning in self-defense. Appellant's contention might have merit with respect to the assault charge for shooting Stadter, although there was no evidence at trial that appellant was aware of Stadter's past as outlined in Mr. Dail's testimony. However, this appeal is from a judgment convicting him of illegally causing Tregoining's death, and there is nothing in Mr. Dail's testimony about Tregoning which would have given credibility to appellant's claim of self-defense. Therefore, the deposition was not relevant as to the charge against him resulting from Tregoning's death. Accordingly, even if the court did err, there was no prejudice to appellant as a result. RCr 9.24.

The judgment appealed from is affirmed.

ALL CONCUR.

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APPENDIX B

SUPREME COURT OF KENTUCKY

81-SC-469-D
(80-CA-905-MR)

DEWITT TALMADGE LANGFORD — APPELLANT

v. GRAYSON CIRCUIT COURT
#80-CR-001 & #80-CR-002

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORDER DENYING MOTION FOR
DISCRETIONARY REVIEW

The motion of Dewitt Talmadge Langford for a review of the decision of the Court of Appeals is denied.

ENTERED October 6, 1981.

_____

Chief Justice

APPENDIX C

CONFERENCE IN CHAMBERS:

BY ATTORNEY SIMMONS: I make the motion to be permitted to read so much of Harvey Dale's deposition as reflects the connection between Jim Tregoning and the airplane that Vic Stadter was using in a smuggling operation. And, we further renew our motion to read so much of Harvey Dale's deposition as sets forth the reputation and character of Vic Stadter. Now, the Commonwealth has resisted this on the basis and we think that it would be germane to read into the record that part of Harvey Dale's deposition where he says the last time he saw Vic Stadter that Stadter held a shotgun, a cocked shotgun to his head for twenty minutes. The Commonwealth has resisted that on the basis that you can't take incidence of prior conduct, but yet, they have spent four

and a half hours, here, putting in incidence or prior conduct on the part of Mr. Langford and his dealings in the oil business. And, that doesn't really have anything to do with what the shooting is about. So, it appears to me that if the Court is going to let them do that, and you have, that the least we can do is read into the record Harvey Dale's testimony about Vic Stadter and the shotgun that Vic held to Harvey's head for twenty minutes or so.

BY ATTORNEY STONE: May I respond to that, Your Honor?

BY THE COURT: Yes you may.

BY ATTORNEY STONE: Vic Stadter is not on trial here, number one. And, number two, Vic Stadter and Harvey Dale are in law suits all over the place. They are hostile to each other. Number three, the deposition that was taken of Mr. Dale's- We would have to get into

his credibility, his truth and veracity and all this pertaining to prior felony conviction as to believability, based on the deposition, number three, if it was admitted. And, number four, he's talking about strictly an isolated incidence. I specifically asked him in the deposition about incidences he knew about and one was in some bar and one or two people that he knows that are out of the country witnessed it. And, the other one was an incident that happened some place between him and Stadter. Now, what they are trying to do is use- Harvey Dale went to the penintentiary- get a man who hates Vic Stadter and bring in his deposition and read it to establish that Vic Stadter is a violent man. And, it is clearly inadmissible. Dale's felony conviction, presently, go to his credibility and the reason he is in there. And, I think

that to get into airplanes and smuggling marijuana on Vic Stadter is so out of bounds that it is funny. Now, Mr. Simmons talks about how much leadway I lead in talking about the oil business. Whether he realizes it or not, there is a purpose in going into Mr. Langford's activities in the oil business and as far as the Commonwealth's case goes. Because that is part of our motive in this case and every case that you try, you have got to have a motive. If you don't have a motive, you are in trouble. I may be in trouble, but, you are going to have to have a motive. And, I think, Judge, under the rules and under the case law that is completely inadmissible to read that deposition of Harvey Dale's. And, otherwise, he is also in the same point as Mr. Wagner was, because when I talked to him about the community and the people and where they had lived

and discussed it with people, he mentioned one person, I think, and he didn't have any other incidences anywhere. He never did say in there that he wasn't a peaceful and quiet man and he never knew of anyone he had had any trouble with. That's in the deposition. And, on that basis without getting into the other stuff, it is not admissible.

BY THE COURT: Ok, I will listen to you.

BY ATTORNEY SIMMONS: Well, I don't know that I need to respond to what Mr. Stone has said. But, you know, Mr. Stone seems to think that everybody is fair game except his witnesses. He says Vic Stadter is not on trial here. He may not be on trial here, but his character is just as much an issue as is Mr. Langford's business dealings. Certainly, at this point, the jury out there may think that Mr. Stadter is

a gilted lily. But, he isn't. You know it. You have read Harvey Dale's deposition. I know it. And, I think that the jury ought to know it.

BY THE COURT: Well, I let some evidence in, I couldn't help it. And, if Mr. Langford wasn't as old as he is, I would have declared a mistrial. Plus, the fact that I don't want to go through this any more. And, that was on Mr. Langford saying that he had been in prison.

BY ATTORNEY STONE: Federal Penitentiary for income tax evasion. And, then he talked another time about him giving him some money because his partner had gone to the pen. He even got that in. He got so much in that I can't remember how much. I couldn't stop him; I just gave up on him.

BY THE COURT: Now, had he not been like he was, I would have sent

the jury back and fined him and declared a mistrial. I would have done that.

BY ATTORNEY SIMMONS: I don't doubt that at all.

BY THE COURT: But, I couldn't do that with the way the circumstances were. I mean, the man is going to be seventy-seven years old this summer. And, I just think we need to go on with the trial. But, I am not going to let you read Harvey Dale's deposition.

BY ATTORNEY SIMMONS: None of it?

BY THE COURT: None of it.

BY ATTORNEY SIMMONS: Well, we want to put it in by avowal.

BY THE COURT: It is in the record and it can be in by avowal. It is in the record and if it is appealed the whole deposition is in the record.

Here is the way I look at it. Harvey Dale's evidence is tainted. He said in his deposition that he would like

to see Mr. Langford come clear.

BY ATTORNEY SIMMONS: Well, (inaudible)

BY THE COURT: I know, he said that. And, he is in the pen on a felony charge and if I read the depositions right he and Stadter have had a whole lot of problems.

BY ATTORNEY SIMMONS: They have also had a whole lot of elicit business dealing too.

BY THE COURT: I know, but elicit business dealings in theirself doesn't indicate a predisposition to kill somebody or do things about them, you know. I am going to exclude the whole thing.

Now, are you all done, now, or do you have more evidence?

BY ATTORNEY SIMMONS: We are done.

BY THE COURT: You rest then?

Opposition

81-1234

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

DEWITT TALMADGE LANGFORD - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

The respondent accepts the Petitioner's Statement of (1) Questions Presented, (2) Parties, (3) Opinion Below, (4) Jurisdiction and (5) Constitutional Provisions.

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DEWITT TALMADGE LANGFORD - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY AND APPENDIX

COUNTERSTATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case except as contradicted in the body of this response. It should be noted that Petitioner's Statement of the Case presents only petitioner's testimony and evidence supportive of his contention of self-defense which was evidently rejected by the jury. In that the sole issue on appeal necessitates no further discussion of the additional evidence, respondent will not detail the evidence supportive of the jury's verdict.

REASONS FOR DENYING THE WRIT

I.

The Trial Court and the Appellate Court Properly Concluded That the Deposition Testimony Was Irrelevant.

The sole issue presented in this petition is whether the trial court erred in refusing to admit deposition testimony of Harvey O. Dail. The deposition testimony excluded by the court details a long history of dealings between the witness and Vic Stadter and describes various alleged criminal activities of Stadter. Such evidence was clearly and undeniably irrelevant to the appeal presently before the court. This appeal is from a judgment convicting appellant-petitioner of illegally causing *Tregoning's* death not Stadter's assault. Furthermore, there is absolutely nothing in Mr. Dail's testimony about Tregoning that would have given the slightest credibility to petitioner's claim of self-defense. The court properly excluded said testimony from jury consideration.

It is within the discretion of the trial court to determine the admissibility of evidence. *Glen Falls Insurance Co.* v. *Ogden,* Ky., 310 S. W. 2d 547 (1958). There is nothing in the record or in the briefs submitted to the Kentucky courts or this Court to indicate an abuse of discretion. The trial court carefully considered the deposition before ruling it inadmissible, and a reading of the deposition supports the trial court's exclusion. In view of the clear lack of relevance of the deposition testimony and the discretion which

the trial court was entitled to exercise, it is clear that it would be improvident of the court to grant petitioner's request. See *Moor* v. *Texas & New Orleans Railroad Co.*, 297 U. S. 101 (1936).

II.

The Instant Case Does Not Present a Novel Case Not Previously Decided by the United States Supreme Court or an Issue Decided Differently From a Number of Its Sister States.

Despite petitioner's contention to the contrary, the sole issue presented in this petition is a simple issue of relevancy with regard to deposition testimony that was neither substantive nor relevant to the issues before the trial and appellate courts in this case. Unlike the factual situation in the cases cited by petitioner in his brief, petitioner was not denied any opportunity to present his defense. See *Chambers* v. *Mississippi*, 410 U. S. 284 (1973), *Green* v. *Georgia*, 442 U. S. 95 (1979). Those cases pertained to the exclusion of relevant, admissible testimony as a result of a mechanical state rule rather than the exclusion of unrelated, irrelevant deposition testimony after careful consideration by the court.

CONCLUSION

In that the Kentucky Appellate Courts properly affirmed the trial court's exclusion of the deposition testimony here at issue, and because no novel or important issue is presented in this appeal, respondent respectfully submits that this Petition for Certiorari must be denied.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that three (3) copies of the foregoing Response has been mailed, United States Postage Prepaid, to Hon. David and Rebecca Murrell, Attorneys at Law, 233 West Broadway, Louisville, Kentucky 40202, on this the 12 day of January, 1982.

Assistant Attorney General